

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION**

IN THE MATTER OF THE	§	
REPRESENTATION OF MULTIPLE	§	
TARGETS:	§	CAUSE NO.: EP-06-CR-1369FM
	§	
CHARLES ROARKE,	§	
MILTON “MICKEY” DUNTLEY, AND	§	
ERNIE LOPEZ	§	
	§	

**GOVERNMENT’S RESPONSE TO SUR-REPLY
TO MOTION TO DISQUALIFY COUNSEL**

COMES NOW the United States of America, by and through the United States Attorney for the Western District of Texas and the undersigned Assistant United States Attorney, and files this the Government’s Response to Sur-Reply to Motion to Disqualify Counsel for Conflict of Interest, and would respectfully show unto the Court the following:

CORRECTION TO GOVERNMENT’S RESPONSE

In her most recent motion, counsel for targets Charles Roark; Milton “Mickey” Duntley; and Ernie Lopez, Ms. Stillinger, correctly identifies to the Court the factual error in the government’s response regarding which targets were present at the NCED Board of Directors Meeting Minutes of July 25, 2003. In the government’s original Motion to Disqualify Counsel for Conflict of Interest and Brief in Support Thereof, on page six, the government correctly stated: that in the “NCED Board minutes for that meeting, under the category “OTHERS PRESENT,” the name “Ernie Lopez - C.O.O. appears.”¹ The government did not state, in its original motion that both Lopez and Roark

¹A photocopy of the actual minutes of the July 25, 2003 NCED Board Meeting has been provided to the Court and Ms. Stillinger under seal subsequent to a separate pleading.

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were at that Board of Directors Meeting. During the time the government's response containing the error was drafted and filed, lead counsel for the government was out of the country and individuals less familiar with the facts of the case were assigned to the task. The government did not intend to mislead the Court and apologizes to both the Court and counsel for its inadvertent error.

REPLY TO SUR-REPLY

In her Sur-Reply, counsel argues, again, that because the government has only provided the minutes to the July 25, 2003 NCED Board of Director's Meeting, no conflict exists. First, every target of a criminal investigation should be entitled to representation that is conflict free. As previously delineated in prior filings, identifying the potential for conflict is as important as relaying an actual conflict. Since the initial motions and responses were filed with this Court, agents have continued to review documents acquired pursuant to this investigation by a variety of means including documents seized pursuant to court ordered search warrants; conversations intercepted as a result of court ordered wire and electronic interception; and documents voluntarily tendered by witnesses, informants and cooperating subjects and targets, among others means.

Additional items have been located that may assist the Court in making the decision. On July 12, 2007, representatives of ReadyOne (formerly NCED) identified and provided to the government a September 8, 2004 e-mail from Ernie Lopez to Frank Apodaca and a response e-mail from Apodaca to Lopez on that same date, which follow the e-mail communication noted in the government's original Motion to Disqualify.² A response to Apodaca's e-mail to Lopez and others seeking employment for the son of Duntley, which e-mail was sent by Apodaca on September 8,

²A copy of these e-mails will be provided under seal to Ms. Stilling and the Court.

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2004 at 5:22 PM. occurred eight minutes later, at 5:30 PM, when Lopez sent an e-mail to the e-mail address, stevev@saharasportswear.com. Lopez' message draws "Steve[']s attention to the job applicant, Aaron Duntly, should "Steve" need someone in sales.³ This message to "Steve" was copied by Lopez to the e-mail address of Frank Apodaca. At 6:48 PM, on September 8, 2004, Frank Apodaca sent an e-mail to Lopez stating: "Thanks, Ernie. Political favor."

In a communication intercepted pursuant to Court ordered and authorized interceptions, occurring over the cellular telephone of Marc Schwartz on October 4, 2005, Frank Apodaca and Marc Schwartz discussed Aaron Duntley's job performance at Sahara. Apodaca told Schwartz that he had gone to "the store" a week or so prior to the conversation and "he [Aaron Duntley] was not there." Apodaca acknowledges that he did not know if Duntley's position had been changed, but he did know Duntley was not at the retail store.⁴ Schwartz responded that "[T]hey said he's [Aaron Duntley] been tardy ninety-six times.." Schwartz opined to Apodaca that someone at Sahara "is trying to get back at him from the last..." Apodaca responded: "Well, I'll get involved with that, if I need to." Schwartz then told Apodaca, "Right, until after this November ninth vote,⁵ and I'll be happy to go talk to Mickey about, tell [sic] talking to his son." "And I just don't want, don't want

³In fact, Aaron Duntley did get a job at Sahara Sportswear after this string of e-mails.

⁴Based on the criminal investigation to date, there is no indication that Apdoaca had any job-related association with Sahara Sportswear, a for profit company financially related to NCED.

⁵The investigation, including many intercepted wire and electronic communications, reveals that Schwartz was referring to the vote planned for the Ysleta Independent School District (YISD) Board of Trustees November 9, 2005, on two items: the continuation of the Access contract for administration of the Ysleta District healthcare benefits program and the replacement of legal YISD counsel with the law firm of Delgado, Acosta.

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him canned before the vote. Think about that and we'll talk about it when you get back." Apodaca responded "Okay. Sounds good Marc."

Sealed transcripts of three additional intercepted conversations have been provided to the Court for consideration in this matter as well. On July 23, 2005, a lengthy conversation was intercepted occurring over the cellular telephone of Marc Schwartz between Schwartz and Bob Jones. Although most of the conversation did not pertain to the issue before the Court, that is Duntley's relationship to Lopez and/or Roark., a brief mention pertaining to Duntley's son's job is made.⁶

Schwartz says, "...and this is the ugly strategy, but it's the only one I think that plays, we have four votes on Ysleta that plays ain't going anywhere, led by Mickey Duntley whose son works for you." Jones begins to reply, "Yeah, I understand. Who I've...", but is interrupted by Schwartz who begins, "We have..." Then Jones finishes his thought, "...gone out of my way now with." Schwartz replies, "Absolutely."

In an intercepted conversation occurring between Schwartz and Duntley on August 18, 2005, they speak about Aaron Duntley's poor work performance. Basically, Duntley complained about the manner in which his son was being treated by his supervisors. Duntley alludes to the fact that he has visited his son at work and is dissatisfied with the attitude of his son's supervisor. After Duntley speaks for some time, Schwartz replies, "He knows and maybe you know, is he's protected.

⁶A redacted transcript of this call will be provided to the Court and counsel in a separate sealed filing.

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So you know, that's what I do. That's what I gotta do. Do you know what I'm sayin'?" Schwartz promises to investigate Aaron Duntley's poor treatment.

On October 3, 2005, an employee, Stella, called Schwartz to tell him that Aaron Duntley was on his "final notice for poor attendance."⁷ Stella told Schwartz "He's had excessive tardiness. So I thought I'd give you a heads up that we might be letting him go." Schwartz asked, "Has he truly been late or are we just writing it up?" Stella replied, "No, he's truly been late. I've got all the attendance records here. He's had over fifty tardies, and then he had an additional eight more, and then now he's got ten more, and then it's just become so excessive that Steve doesn't even want him there either." Schwartz asked Stella, "Tardies, how late?" Stella explains that at times it is "thirty minutes" but the length of Aaron's tardiness "varies." Schwartz then asked, "Tell me it's not five minutes." After a few more words, Schwartz assured Stella, "I'll take care of it." It is important to note that this conversation took place the day before the conversation referred to above between Schwartz and Apodaca in which they discuss that Aaron could not be "canned" before the YISD vote which was to occur November 9, 2005.

In summary, Ernie Lopez received an e-mail from Apodaca seeking employment for Aaron Duntley. Lopez forwarded Apodaca's e-mail to "Steve" at Sahara and copied Apodaca on the forward. Apodaca responded to Lopez that the hire was a political "favor." It is the government's position Lopez is either a co-conspirator or a witness regarding the hiring of Duntley's son. The intercepted conversations demonstrate the nefarious nature of the hire. Additionally, it appears

⁷The entire transcript of this short conversation will be provided to the Court and counsel sealed in a separate filing.

